above. Mensa in answer to the defendants' application offered this court no reason why it (Mensa) could not with reasonable diligence have claimed in the first action the relief it was claiming against the defendants in this action. On the evidence before me it was clear that Mensa at the time material to the first action knew of the nexus between Eikobina and the defendants in this action and by exercising reasonable diligence could have sought in the first action the relief it was claiming in this action. It seemed to me that Mensa having claimed but failed to obtain specific relief in the first action was seeking a proverbial second bite of the cherry in this action.

Accordingly the defendants' application for an order that the writ and statement of claim be struck out is allowed with costs to be taxed.

Application allowed.

Solicitors: *Gulam & Wong; Shook Lin & Bok.*

Reported by *Zarinah Marican*

Borneo Housing Mortgage Finance Bhd v Bank Bumiputra Malaysia Bhd

HIGH COURT (BORNEO) — ORIGINATING SUMMONS NO 150 OF 1988
SYED AHMAD IDID JC
12 NOVEMBER 1990

Land Law — Sale and purchase agreement — Registered owner executed memorandum of transfer in favour of purchaser — Payment of full purchase price — Release of title deed to purchaser's solicitor — Registered owner has divested himself of all beneficial interest in land and vests it in bona fide purchaser — Registered owner becomes trustee for purchaser

Trusts and Trustees — Native land — Registered owner holding native land as trustee for company — Whether trust is illegal — Native title has been converted to country lease title — Registered owner has executed memorandum of transfer in favour of purchaser who had paid full purchase price and was given possession of title deeds — Sabah Land Ordinance, ss 17(1), 88 & 95

Contract — Illegality — Native land held by registered owner as trustee for company — Company applied for conversion of native titles to country lease titles and subdivision — Sale and purchase agreement in respect of native land was entered between company and purchaser — Whether agreement is illegal — Approval for conversion and subdivision — Agreement was made with a view of sale after issue of subdivided title — Sabah Land Ordinance, s 17(1)

Two pieces of native land were registered in the name of DD as trustee for PD Sdn Bhd. PD Sdn Bhd applied for conversion of the native titles to country lease titles and for their subdivision so as to build shophouses. Sale and purchase agreements in respect of the shophouses were entered between PD Sdn Bhd and 29 purchasers. Approval for the conversion of the native titles to country lease titles was obtained. Subsequently, upon PD Sdn Bhd's application, the plaintiffs granted end-financing facility to the 29 purchasers. The 29 purchasers then entered into loan agreements cum assignment with the plaintiffs. Pending the issue of subdivided country lease titles, PD Sdn Bhd executed memorandum of transfer in escrow in favour of the 29 purchasers. The 29 purchasers also simultaneously executed memoranda of charge in escrow in the plaintiff's favour. Upon the issue of the subdivided country lease titles in the name of DD, PD Sdn Bhd so as not to incur additional costs, arranged for direct transfer from DD to the 29 purchasers. DD then executed fresh memoranda of transfer in escrow in favour of the 29 purchasers. All the 29 subdivided title deeds had been released to the common solicitors for both the plaintiffs and the purchasers in order to effect the registration of the transfers and the charges. The full purchase price had been settled. Out of 29 subdivided title deeds, 22 had been transferred to the purchasers and had been charged in favour of the plaintiffs. The transfer in respect of the other seven title deeds were held back by prohibitory orders which were entered by the defendants, the judgment creditors of DD. The plaintiffs applied to set aside the prohibitory orders.

Held, allowing the application:

(1) A registered owner by executing a memorandum of transfer or upon receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the bona fide purchaser. The registered owner becomes a bare trustee for the purchaser.

(2) The contention that the trust relationship between DD and PD Sdn Bhd was void and unenforceable for breaching s 17(1) of the Sabah Land Ordinance, is not substantiated. DD had executed memoranda of transfer in favour of the purchasers who had paid the full purchase price and were given possession of the title deeds.

(3) Upon reading cl 12 of the sale and purchase agreements, the agreements were made with a view of sale after the issue of the subdivided titles. Hence the agreements are not contrary to the Ordinance.

(4) The courts are inclined to observe the principles of equity in the protection of the little individual, the purchaser, as against big institutions or financiers which are perceived as being able to withstand the loss, if any.

[Bahasa Malaysia summary

Dua bidang tanah orang asli telah didaftarkan dalam nama DD sebagai pemegang amanah bagi PD Sdn Bhd. PD Sdn Bhd memohon penukaran hakmilik orang asli kepada hakmilik pajakan desa dan bagi pecah lot supaya dapat membina rumah-rumah kedai. Perjanjian jualbeli berkenaan rumah-rumah kedai dimasuki antara PD Sdn Bhd dan 29 pembeli-pembeli. Kebenaran pertukaran hakmilik orang asli kepada hakmilik pajakan desa diperolehi. Kemudiannya, atas permohonan PD Sdn Bhd, plaintif memberi kemudahan pembiayaan akhir kepada 29 pembeli. Pembeli-pembeli itu lalu memasuki perjanjian pinjaman dan menyerahhak dengan plaintif. Sementara menunggu pengeluaran hakmilik pajakan desa yang telah dipecah lot, PD Sdn Bhd menandatangani memoranda pindahmilik hak dalam eskrow bagi faedah 29 pembeli-pembeli juga. Pembeli-pembeli juga pada masa yang sama menandatangani memoranda gadaian dalam eskrow bagi faedah plaintif. Apabila hakmilik pajakan desa dikeluarkan dalam nama DD, PD Sdn Bhd telah mengatur untuk pindahmilik terus daripada DD kepada 29 pembeli-pembeli supaya kos tambahan tidak ditanggung. Kemudiannya, DD menandatangani memoranda pindahmilik dalam eskrow yang baru bagi faedah 29 pembeli-pembeli. Kesemua 29 suratan hakmilik yang telah dipecah lot

dilepaskan kepada penguamcara yang sama mewakili kedua-dua plaintif dan pembeli-pembeli supaya pendaftaran pindah-milik dan gadaian bloeh dilaksanakan. Harga pembelian yang penuh diselesaikan. Daripada 29 suratan hakmilik yang di-pecahlot, 22 daripadanya telahpun dipindah milik kepada pembeli-pembeli dan telah digadaikan bagi faedah plaintif. Pindahmilik untuk tujuh lagi suratan hakmilik tanah digan-tung oleh perintah larangan yang dimasukkan oleh defenda-defendan, penghutang penghakiman DD. Plaintif memohon mengenepikan perintah-perintah larangan.

Diputuskan, membenarkan permohonan:

(1) Seseorang tuanpunya yang berdaftar dengan menan-datangani memoranda hakmilik atau setelah menerima harga pembelian secara penuh, telah melucutkan dirinya daripada kesemua kepentingan benefisial dalam tanah dan mele-takhaknya dalam pembeli bona fide. Tuanpunya berdaftar menjadi pemegang amanah semata-mata sahaja bagi pembeli.

(2) Perselisihan bahawa pertalian amanah antara DD dan PD Sdn Bhd adalah tak sah dan tidak boleh dikuatkuasakan kerana melanggar s 17(1) Ordinan Tanah Sabah, adalah tidak disokong dengan butir-butir. DD telah menandatangani memoranda pindahmilik bagi faedah pembeli-pembeli yang membayar harga pembelian secara penuh dan telah diberi possessi suratan hakmilik tanah.

(3) Atas bacaan fasal 12 perjanjian jualbeli, perjanjian-perjanjian telah dibuat dengan maksud untuk dijual selepas hakmilik pecah lot dikeluarkan. jadi perjanjian-perjanjian itu tidak melanggar Ordinan itu.

(4) Mahkamah adalah lebih cenderung mematuhi prin-sip-prinsip ekuiti dalam mempertahankan individu kecil, pembeli-pembeli daripada terhadap institusi besar atau badan kewangan yang dianggap, sebagai lebih berupaya menanggung kerugian, jika ada.]

Cases referred to

1 *Ng Boo Bee* v *Khaw Joo Choe & Ors* (1916) 14 SSLR 90 (refd)
2 *Karuppiah Chettiar* v *Subramanian* [1971] 2 MLJ 116 (refd)
3 *Temenggong Securities* v *Registrar of Titles, Johore* [1974] 2 MLJ 45 (refd)
4 *Ng Kheng Yeow* v *Chiah Ah Foo & Ors* [1987] 2 MLJ 330 (refd)
5 *Firth Concrete Industries Ltd* v *Duncan* [1973] 1 NZLR 188 (refd)
6 *Chua Hee Hung & Ors* v *QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 (refd)
7 *Ong Chat Pang & Anor* v *Valliappa Chettiar* [1971] 1 MLJ 224 (folld)
8 *Manang Lim Native Sdn Bhd* v *Manang Selaman* [1986] 1 MLJ 379 (refd)
9 *Foo Say Lee* v *Ooi Heng Wai* [1969] 1 MLJ 47 (refd)
10 *Sajan Singh* v *Sardara Ali* [1960] 1 All ER 269 (folld)
11 *Crowly* v *Bergtheil* [1899] AC 374 (refd)
12 *UMBC* v *Goh Tuan Laye & Ors* [1986] 1 MLJ 169 (refd)

Legislation referred to

Sabah Land Ordinance ss 4, 17(1) (2), (3), (4), 64, 88, 95
Sarawak Land Code s 8

Chong Kah Kiat for the plaintiffs.
Vincent Fernandez for the defendants in OS No 151 and OS No 152 of 1988.
Philip Lee for the defendants in OS No 150 of 1988.

Cur Adv Vult

Syed Ahmad Idid JC: This is an application by the plaintiffs in OS Nos 150, 151 and 152 of 1988 for an order that the prohibitory orders including any renewals thereof obtained by the defendants against the seven (7) pieces of lands held under Keningau Country Leases Nos 135319667, 135319836, 135319845, 135391890, 135319916, 135320026 and 135320099 and registered against the said titles in the Central Land Registry and any order for the sale of the said lands be set aside on the ground that Dunstan Dumpangol, the present reg-istered owner of the said lands, has no more beneficial interest therein for the defendants to seize and sell.

The court had on 18 January 1989 ordered that Originating Summons No 150 of 1988 be consolidated with OS No 151 of 1988 and OS No 152 of 1988 as the three applications are of the same subject matter giving rise to common questions of law and facts.

The plaintiffs' applications are to set aside the pro-hibitory orders obtained by both the defendants against, inter alia, the seven pieces of landed properties under Country Leases on the ground that the registered owner, one Dunstan Dumpangol, had no more beneficial inter-est therein for the defendants to seize and sell.

The plaintiffs' claim are as the equitable chargees and assignees of the purchasers for the beneficial inter-est in the seven pieces of landed properties as against both the defendants' claim as the judgment creditors of the registered owner.

Facts

There were two original pieces of lands under Native Titles 133031544 and 133031553 registered in the name of Dunstan Dumpangol.

A private limited company called Pegalan Develop-ment Sdn Bhd was established in December 1979 with Dunstan Dumpangol as the chairman and a shareholder.

The plaintiffs had on 25 February 1981 received an application from one Pegalan Development Sdn Bhd (hereinafter called 'the company') vide letter dated 23 February 1981 to request for end financing facility to their shophousing project in Keningau (hereinafter called 'the project') which project comprised of 67 units of two-storey shophouses. The project involved the devel-opment of two (2) pieces of native lands then under conversion and subdivision into country leases.

The aforesaid company in their application to the plaintiffs for end financing facility had represented that the two (2) pieces of native lands were registered in the name of their chairman Dunstan Dumpangol as trustee of the company and that upon conversion and subdivi-sion into country leases the subdivided land titles would be transferred to the company. Thereafter the company

would undertake to transfer the subdivided titles to individual purchasers.

The company had on 2 April 1981 informed the plaintiffs that the Director of Lands and Surveys had approved the conversion and subdivision of the two (2) pieces of native lands into subdivided country leases under letter of approval dated 15 March 1981.

The plaintiffs had accordingly on 21 September 1981 approved the company's application to provide end finance up to 35 applications by individual purchasers in respect of the project. The plaintiffs eventually approved end finance to purchasers of 29 units of shophouses including purchasers of the seven affected landed properties.

The plaintiffs had thereupon entered into the relevant loan agreement cum assignment documentation with all the 29 successful applicants/purchasers including the purchasers for the seven affected landed properties.

Pending the issuance of the subdivided land titles under country leases and having received from the respective purchasers and then from the plaintiffs progressive payments out of the approved loan moneys the company had executed the relevant memoranda of transfer in escrow in respect of the subdivided land titles in favour of the 29 purchasers. The said purchasers had simultaneously executed the memoranda of charge in escrow in favour of the plaintiffs.

The relevant subdivided land title deeds under country leases were eventually issued by the Director of Lands and Surveys in November 1983 to the registered owner Dunstan Dumpangol.

As the project was then already completed when the subdivided land title deeds under country leases were issued the company decided not to incur additional costs in undertaking the exercise of transferring the subdivided land titles to its name. Instead, it arranged for direct transfer from the registered owner Dunstan Dumpangol to the respective purchasers of the project. The plaintiffs had no reason to object in view of the fact that the registered owner Dunstan Dumpangol was also the chairman and shareholder of the company. The company has also provided the plaintiffs with a copy of letter dated 12 February 1982 signed by the said Dunstan Dumpangol declaring and holding himself as trustee of the company. The company had also shown to the plaintiffs that it has paid for all the conversion and subdivision premium to the state authority vide letter dated 15 November 1982.

More importantly, the registered owner Dunstan Dumpangol had in 1984, after the project was completed, executed fresh memoranda of transfer in escrow in favour of the purchasers in respect of the project including all the 29 purchasers provided with end finance facility by the plaintiffs.

All the 29 subdivided land title deeds under country leases had been released by the company and/or the registered owner Dunstan Dumpangol to the purchasers' solicitors Messrs Lee & Thong who are also the solicitors for the plaintiffs on 29 November 1983 to effect the necessary transfers and charges as the full purchase price had been settled. Out of the 29 subdivided land titles, 22 had been duly transferred to and registered in the names of the relevant purchasers and duly charged to and registered in the name of the plaintiffs as the chargees. The remaining seven land title deeds are the seven affected landed properties which had been held back due to the prohibitory orders, the subject of this application.

The issues

(1) Whether the declared trust relationship between the registered owner and the company is in breach of s 17(1) of the Sabah Land Ordinance and therefore void and unenforceable for the illegality.

(2) Whether the sale and purchase agreements entered between the company and the purchasers are tainted with illegality being in breach of s 17(1) of the Sabah Land Ordinance.

(3) Whether the plaintiffs or their assignors, the seven affected purchasers, by not registering their interest (transfers and charges or lodging any caveat) have thereby lost their priority to the defendants' prohibitory orders.

(4) If the trust is valid, whether the registered owner had thereby divested his beneficial interest in the said lands notwithstanding the fact that the defendants' prohibitory orders were registered on 21 May 1986 prior to the plaintiffs' caveats.

(5) Whether the claim by the registered owner that he held the landed properties in trust was an attempt to defeat the defendants' claim under the judgments obtained.

(6) Notwithstanding the above issues, whether the fact that the registered owner by releasing the relevant land title deeds under country leases to the plaintiffs and by executing the relevant memoranda of transfers in escrow in favour of the seven affected purchasers had thereby divested his beneficial interest thereof in favour of the purchasers and the plaintiffs.

Contentions

On issue (1): The plaintiffs submit that as they claim beneficial interest over lands held under country leases, s 17 of the Sabah Land Ordinance should not apply. The plaintiffs are of the view that the defendants, in raising s 17, are in effect reviving the original two native

titles which had been legally extinguished (when the country lease titles were issued on 25 June 1981 for a period from 1 January 1981 to 31 December 2079).

But the defendants say that s 17(1) of the Land Ordinance provided, inter alia, that all dealings in land between non-native and native are expressly forbidden and no such dealing shall be valid and shall be recognized in any court of law unless such dealing shall have been entered into or concluded before 16 January 1883 or falls within the ambit of sub-cl (2), (3) and (4) thereof. Section 64, Part IV of the Land Ordinance provides that in the case of land held by natives no non-native shall purchase such land unless in accordance with the terms of s 17, or acquire any interest therein by way of charge or otherwise.

To the defendants, it is clear that s 17 of the said Ordinance prohibits all dealings in land between natives and non-natives unless they have been entered into and concluded before 16 January 1883 or in the terms of sub-ss 2, 3 and 4 thereof. By s 4 of the said Ordinance, dealings is defined as any transaction of whatever nature by which land is affected under this Ordinance.

I find that there was nothing illegal when the registered owner (and the company Pegalan Development Sdn Bhd) were issued with subdivided country leases by the government authority to replace the two original native titles. Indeed it has been made very clear that the plaintiffs' claim was for the beneficial interest in those land titles held under country leases. The cases of *Ng Boo Bee* v *Khaw Joo Choe & Ors*,[1] *Karuppiah Chettiar* v *Subramaniam*,[2] *Temenggong Securities Ltd* v *Registrar of Titles, Johore*,[3] *Ng Kheng Yeow* v *Chiah Ah Foo & Ors*,[4] *Firth Concrete Industries Ltd* v *Duncan*[5] and *Chua Hee Hung & Ors* v *QBE Supreme Insurance Bhd*[6] are clear authorities for the proposition that a registered owner by executing a memorandum of transfer or upon receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the bona fide purchaser. The registered owner in effect becomes a bare trustee.

In *Ong Chat Pang & Anor* v *Valliappa Chettiar*[7] where Gill FJ at p 229 B said:

> In my judgment, the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser.

And further down at p 229 H Gill FJ added that:

> Where the purchase money had been paid and the purchaser has received the instrument of transfer and the title deeds from the vendor but omits to complete registration, if the vendor comes to set aside the sale, it would be a good answer to say that he has no interest in the land because he cannot retain the estate for a moment against the purchaser.

I must, here, deal with s 17(1) which states:

> Except with the written permission of the Minister, all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January 1883, or in the terms of the next following clause.

Both the defendants Bank Bumiputra Malaysia Bhd and Malaysia Credit Finance Bhd in their respective affidavits contended that the purported trust relationship between the registered owner and the company Pegalan Development Sdn Bhd was in breach of s 17(1) and therefore void and unenforceable.

What is a dealing? We can see the full import of this word in ss 88 and 95 of the Sabah Land Ordinance, eg 'no... dealing with ... shall be valid until it has been registered ....' Judith E Sihombing in her text *The National Land Code* (1981) in Ch 14 at pp 333-334 has this to say of the term 'dealing':

> The term 'dealing' refers to a transaction in land entered into in accordance with the provisions of the Code which, when completed and an instrument in statutory form is registered, gives rise to a substantive entry on the register appropriate to the transaction.
>
> The dealing is
> (a) ...
> (b) not a transaction involving the creation of a beneficial interest in land under a trust; the trust is created under the principles of trust law; and
> (c) ...

Law is no befuddled field; the court should not be plunged in mire where there is only darkness and inactivity. We have to see a way to solve the problem and there is a problem as otherwise there would not be this case here. I intend to look at the questions and issues from the practical perspective. I am of the opinion that all laws should be designed to facilitate and help people rather than put brakes to progress. Here we have an old law while the state of Sabah is developing. If I rule, as defendants wish, that the trust relationship between the legal owner and the company is illegal and in breach of s 17(1) of the Sabah Land Ordinance, where do the seven pieces of landed property go? They are no longer 'native' as declared by the Land Authorities and the state government. The contention of Bank Bumiputra Malaysia Bhd and Malaysia Credit Fiance Bhd that the trust relationship between the registered owner and the company Pegalan was void and unenforceable is not substantiated. In fact, the registered owner had executed the relevant memoranda of transfer in statutory form in favour of the affected purchasers who had paid the full purchase price and were given possession of the relevant land titles.

On issue (2): The defendants submit that the company was not competent to enter into the sale and

purchase agreements with the purchasers of the seven affected properties because (i) at the material times when the agreements were entered into, the status of the lands was 'native'. *Manang Lim Native Sdn Bhd* v *Manang Selaman*[8] was cited in support. Though that case settled the point on s 8 of the Sarawak Land Code (similar in substance to s 17(1) of the Sabah Land Ordinance) in that although it is not an absolute prohibition, authorization is required before a non-native (such as the company) can deal with native lands.

The plaintiffs had entered into loan agreement cum assignment documentation with all 29 successful applicants/purchasers including the purchasers of the seven (7) affected landed properties. The following are the seven purchasers and the dates when their agreements were executed by Pegalan Development Sdn Bhd.

Name	Exhibits	Dates
David Anandan	MMA-5	20.08.80
Vincent Anandan	MMA-6	26.10.81
Lorin bin Malim	MMA-7	26.11.81
Tan Soo Kian (together with: Chin Yee Lan Chin Yee Lin and Chin Yee Hen)	MMA-8	15.03.82
Auk Joo Tee	MMA-9	11.09.80
Liew Shin Hien @ Elizabeth Liew	MMA-10	29.12.81
Liew Kuat Kiong (together with Liew Ket Min)	MMA-1	26.09.80

It is also important to note that the approval for conversion of the two native titles to country leases was only obtained from the government authority on 25 March 1981 and that the conversion premium was only paid by the company to the government on 3 November 1982 and that the eventual country lease titles were finally issued on 17 November 1983. It is relevant to consider here as to when actually the native title lost its native status, whether at the date of approval of conversion, date when conversion premium was paid or when finally the country lease titles were issued. I have considered the case of *Foo Say Lee* v *Ooi Heng Wai*.[9] Was there an attempt to deal with native land contrary to the Land Ordinance? I was impressed with the defendants' submission that the company's agreement was a sale agreement and not an agreement to sell but this was to cut a word with a scimitar.

This court has to abide by laws and to ensure that persons do not circumvent or act contrary to them. If the sale and purchase agreements signed before the approval of the conversion of the 2 (two) native titles can be declared as 'legal' then (i) what could have happened to them if the conversion did not come through?; (ii) this may lead to other companies throwing laws to the winds and disregarding Acts of Parliament (or the state legislature in our case). On this score, I had considered ruling that the sale and purchase agreements signed prior to 25 March 1981 (marked as MMA-5, MMA-9 and MMA-11 all signed in 1980) are void and of no effect but upon reading cl 12 of the sale and purchase agreement, I can accept that they were made with a view of sale *after* the issue of subdivisional title. Hence, they are not, as the defendants claim, contrary to the provisions of the Ordinance. As in *Sajan Singh* v *Sardara Ali*,[10] I can safely say 'Let the estate lie where it falls.'

Conclusion

It is worthy of note that finance institutions and banks, who are backed by legal brains and qualified managers, do meet empty customers at times when they wish to enforce what they think are forms of security. The securities turn out to be worthless.[9] *Halsbury's Law of England* (4th Ed) at pp 433 and 434 and *Chitty on Contracts* (25th Ed) Vol 1 para 1169 at p 633 should be helpful.

As the law stands, 'where the purchase money had been paid and the purchaser has received the instrument of transfer and the title deeds from the vendor but omits to complete registration' (see *Ong Chat Pang & Anor* v *Valliappa Chettiar*[7]), the purchaser with beneficial interest is protected. The words had been quoted from a 90-year old case of *Crowly* v *Bergthel*:[11] '... even if the vendor fails to surrender the issue document of title and the duly completed transfer documents, with the understanding that these documents will be surrendered at a later date, the vendor still becomes a bare trustee.' *Sale and Purchase of Real Property in Malaysia* by Visu Sinnadurai at 218.

The courts are inclined to observe the principles of equity in the protection of the little individual, ie the purchaser, as against the big institutions or financiers, which are perceived as being able to withstand the loss, if any. The financiers may have lent millions of ringgit on lands which have been fragmented and sold to individual purchasers prior to the charge on the land having been registered (see *UMBC* v *Goh Tuan Laye & Ors*[12]) '... [A]ccordingly, it may be appropriate that English equitable principles relating to land tenure, such as the concept of a bare trust, be resorted to as regards the tenure and incidents of the various kinds of dealings in land in respect of the period prior to registration.' *Land Law in Malaysia Cases and Commentary* by Teo Keang Sood and Khaw Lake Tee at p 170.

Although I had mentioned six issues, I decided to deal with two which were contested by the defendants in their submissions. To recap, my ruling in issue (1): Whether the declared trust relationship between the registered owner and the company is in breach of

s 17(1) of the Sabah Land Ordinance and therefore void and unenforceable for the illegality, is that the trust relationship does not breach the Sabah Land Ordinance and is therefore not void.

My ruling in issue (2): Whether the sale and purchase agreements entered between the company and the purchasers are tainted with illegality being in breach of s 17(1) of the Sabah Land Ordinance, is that the sale and purchase agreements are not tainted with illegality.

My decision here is one which is in tandem with the various Supreme Court decisions (as elaborated earlier).

I therefore grant the order-in-terms of the applications by the plaintiffs dated (i) 29 December 1988 (OS 150 of 1988): (ii) 5 January 1989 (OS 151 of 1988): and (iii) 29 December 1988 (OS 152 of 1988).

Applications allowed.

Solicitors: *Shelly Yap Leong Tseu Chong Chia & Co; Fernandez & Co; Malanjum Lee & Aziz & Co.*

Reported by *Wong Kian Kheong*

Tan Keok Yin v Cheah Saw Hong

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S7-47-796-1987
LIM BENG CHOON J
26 OCTOBER 1990

Family Law — Divorce — Whether marriage has irretrievably broken down — Conduct of parties — Standard of behaviour — Whether interim injunction restraining harassment amounts to res judicata on matrimonial behaviour — Law Reform (Marriage and Divorce) Act 1976, ss 53(1),(2),54(1) & (2)

The husband petitioned for divorce on the ground that the marriage had broken down irretrievably as the parties had lived apart for a continuous period of at least two years. The respondent contested the petition alleging that the petitioner had deserted her, denied that the marriage had irretrievably broken down, and stated that she believed that the petitioner would return to the family. She also submitted that in all the circumstances, and in particular considering the interests of the children, it would be wrong in principle to dissolve the marriage. The petitioner then filed a reply stating that the parties had lived apart for a continuous period of five years, and that the respondent had behaved unreasonably before and after the separation. (In 1986, the petitioner had obtained an interim injunction restraining the respondent from harassing him, his superior, and/or his friends and associates.) The respondent's rejoinder, filed with leave of the court, denied the allegations and accused the petitioner of adultery. At the hearing, both parties refused to give oral evidence or call witnesses, preferring a decision to be made on affidavit evidence alone.

Held, dismissing the petition:

(1) Upon proof of the fact that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, the petitioner has prima facie proved that the marriage has irretrievably broken down, if, but only if, the respondent is not contesting it or has no answer as to why the respondent would allow the petitioner to live separately from her or him as the case may be. However, when the respondent is contesting the petition and is able to put up a reasonable answer that notwithstanding the two-year separation the marriage has not irretrievably broken down, then the court must consider all the circumstances, including the conduct of the parties and the interests of the children of the marriage, before deciding whether the marriage should be dissolved.

(2) The petitioner had in the divorce petition, relied completely on the two-year separation as a ground for divorce, and additionally had produced the necessary certificate from the Reconciliatory Tribunal certifying that they were unable to resolve the matrimonial difficulty. However, the petitioner did not state the nature of the matrimonial difficulty. The respondent's answer has put up a reasonable explanation to support her contention that the marriage has not irretrievably broken down.

(3) If the allegations of misconduct made by the petitioner were true, he would be entitled to a divorce. However, on the facts and from his refusal to give oral evidence, his allegations cannot be accepted, as they do not reconcile with the respondent's answer. The petitioner's allegations appear to be made to hide the fact that he wanted a divorce in order to continue with his infidelity.

(4) Despite the petitioner having obtained an interim injunction restraining the respondent from harassing him, it is